(3)

BEFORE THE HON'BLE HIGH COURT JUDICATURE AT BILASPUR

CR.A. 148 /2001.

APPLICANT: Sahadeo S/o Budhoo Kolta.

(In Jail) aged 45 years R/o village Kamargi

P.S.Lailoonga, Raigarh (.C.G.)

V E R S U S

RESPONDENT: State of C.G.

Appeal of Memo u/s 374 of Criminal procedure Code

Conviction u/s 302 of I.P.C. Sentence Life imprisonment.

(3) Sd/..... Agrawal Advocate AR

AFR

(34)

HIGH COURT OF CHHATTISGSRH AT BILASPUR
(DIVISION BENCH)

CORAM : **HON'BLE SHRI V.K.SHRIVASTAVA &**
HON'BLE SHRI DHIRENDRA MISHRA, J J.

CRIMINAL APPEAL NO. 148 OF 2001

Sahadeo

Vs.

State of Chhattisgarh

JUDGMENT FOR CONSIDERATION

Sd/-
DHIRENDRA MISHRA
Judge

Hon'ble Shri Vijay Kumar Shrivastava, J.

Sd/-
V.K.Shrivastava
Judge

Post for 13/04/2006

Sd/-
Dhirendra Mishra
Judge

(32)

DIVISION BENCH: HON. SHRI V.K. SHRIVASTAVA &
HON. SHRI DHIRENDRA MISHRA,JJ

Criminal Appeal No. 148 of 2001

Appellant	**Sahadeo**
	Vs
Respondent	**State of Chhattisgarh**

Shri Abhay Tiwari, learned counsel for the appellant.
Shri Akhil Mishra, learned P.L. for the State/respondent.

J U D G M E N T
(Delivered on 13/ 04/2006)

Per Dhirendra Mishra, J

The appellant has preferred this appeal under Section 374(2) of the Code of Criminal Procedure against the judgment dated 4.12.2000 passed by the learned first Additional Sessions Judge, Raigarh in S.T.No.69/98 and by which the learned Additional Sessions Judge after holding the appellant the guilty of causing homicidal death of Saheblal has convicted him under section 302 of I.P.C. and sentenced him to undergo life imprisonment.

2. Case of the prosecution, in brief, is that deceased Saheblal and accused resided in village – Kamargah and the deceased was cousin brother of the accused. He had small shop in the village and he used to visit weekly market, Lailunga for purchasing for his shop. On 03.01.1998 also he went to Lailunga and sent fish to his wife for the evening meal. He returned from the market in the evening at about 5.30 p.m. and after taking his early supper, he went to his shop and complained to his wife Bhumisuta (PW-6) that he was not feeling well. He was heavily perspiring and started vomiting and convulsing. Thereafter, he told his wife to call the accused and complained that the appellant has given him something in liquor. It is also alleged that the appellant had evil intention towards the wife of the deceased and few months back, the appellant had tried to molest her and for which the deceased and his father Shankar (PW-5) had beaten him

and on this account the appellant nourished a grudge against the deceased. However, condition of the deceased started deteriorating. He continued vomiting and also passed stool. The white froth started coming out of his mouth and nose and he complained before the complainant that the appellant had administered something to him and ultimately, he died after some time. On 4.1.1998 at about 9.00 a.m. Pandey Prasad gave merg intimation, on the basis of which First Information Report was registered. The police proceeded for the scene of occurrence and after giving notice Ex.P/2 to the witnesses, inquest report (Ex.P/7) was prepared in the presence of the witnesses. The dead body was sent for postmortem examination to the Community Health Centre, Lailunga vide Ex.P/19 where Dr. R.S. Upadhyaya (PW-21) conducted postmortem and submitted his report. However, the doctor did not give any definite opinion regarding cause of death of the deceased and advised that viscera be sent for chemical analysis. Cooked fish, froth (saliva) emanated from nose and mouth lying under the cot on which dead body of deceased was lying and a glass by which the deceased consumed liquor were seized vide Ex.P/3. Fine ash of the oven, pieces of burnt wood and plastic like 8-10 pieces obtained after filtering the ash from the oven were seized vide Ex.P/4 on the basis of memorandum of the appellant (Ex.P/6) which was recorded on 7.1.1998. The appellant was arrested on 08.01.1995. The investigating officer prepared the site plan of Ex.P/5. The liquor bottle containing 350 ml of liquid was seized from Udayram Rawat vide Ex.P/8. Vomit of the appellant was seized from his house vide Ex.P/9. Green plastic container of liquor was seized from Jetmati vide Ex.P/11. Carbon copy of the cash memo of Ex.P/16 along with complete Bill Book was seized vide Ex.P/16 from Pragati Krishi Sewa Kendra vide seizure memo of Ex.P/17. Viscera of the deceased contained in three containers was seized vide Ex.P/20. The police after completing the investigation filed charge sheet against the accused/appellant in the Court of Judicial Magistrate First Class, Katghora who in turn committed the case to the Court of Sessions Judge, Raigarh and the same was received on transfer by the learned trial Court for trial. Learned trial Court framed the charge under Section 302 of the IPC against the accused/appellant. The appellant abjured his guilt.

3. Prosecution in order to establish its case examined 24 witnesses in all. Statement of the accused was recorded under Section 313 of the Cr.P.C. in which he denied the circumstances appearing against him in the prosecution

case and took a defence that he is innocent and has been falsely implicated in the crime as he could not fulfill the demand of Rs.20,000/- made by the police. He has further stated that the police did not proceed against Udayram, Ganjhu, Dev Sai and Bharat because they paid money to the police. Thereafter, the appellant examined Biharilal Gupta as defence witness No. 1 and Lalit Kumar as defence witness No. 2. After hearing counsel for the parties, the learned trial Court convicted and sentenced the accused/appellant as mentioned above.

4. The finding of the learned trial Court is based on the following circumstances;

(a) that deceased Saheblal died of poison on 03.01.1998;
(b) that just before the incident on 27.12.1997 the accused purchased the poison;
(c) that the accused had an opportunity to administer the poison to the deceased;
(d) that deceased Saheblal made oral dying declaration before the witnesses immediately after he took liquor and fell sick stating that accused had mixed something in the liquor.

5. Learned counsel for the appellant submits that the circumstances relied upon by the trial Court have in fact not been established by leading cogent evidence. The finding of the trial Court that cause of death of deceased Saheblal was due to poison is based on the report of chemical examiner, however, there is no evidence available on record to establish that the articles received by the Forensic Science Laboratory, Sagar as mentioned in the report of the F.S.L. were ever sent for examination. It is further argued that the Court below has relied upon the statements of PW-12 Ganjhuram, PW-13 Bharatlal and PW-14 Devsai Sidar to establish that the liquor in question was given by the appellant to the deceased. However, it is argued that the above witnesses had in fact brought the liquor from the shop of *Bejoghar* and handed over the same to the accused and therefore, possibility of involvement of these witnesses in providing poisonous liquor to the accused/appellant who in turn gave the same to deceased Saheblal, cannot be ruled out. It is further argued that there is no eyewitness to the incident and the case of the prosecution is based on the circumstantial evidence. However, the prosecution has failed to prove the guilt of

the accused decisively and therefore, the accused was entitled for benefit of doubt.

6. On the other hand, learned counsel for the State supports the impugned judgment of the trial Court.

7. We have heard learned counsel for the respective parties and perused the material available on record.

8. To establish that cause of death of deceased Sabeblal was poison, report of the State Forensic Science Laboratory, Sagar is available on record which mentions that the article 'J' and 'K' being viscera of the deceased contains organophasphoras pesticide, phasfadan and ethyl alcohol and its quantity is 181 m.g. per 100 gram viscera. The report also mentions that article 'I' being a bottle containing 350 ml liquid seized from Udayram contains organophasphoras pesticide, phasfadan and ethyl alcohol. The articles 'E', 'F' and 'H' being saliva, steel glass by which the deceased consumed liquor and vomit of the appellant seized from the appellant, also contain the same poison. However, the other articles 'A', 'B', 'C', 'D', 'G' and 'L' do not contain poison. As per Section 293 of the Cr.P.C. report of the chemical examiner is admissible in evidence in any criminal proceedings and no formal proof of such certificate/documents is necessary. However, from perusal of the record, we find that there is no evidence on record to show that the articles so seized were in fact sent to the chemical examiner. Even the investigating officer has not been examined. The application under Section 311 of the Cr.P.C. moved by the accused for calling the investigating officer as a Court witness has been rejected by the trial Court vide order dated 24.11.2000. There is also no evidence on record to show as to when the above report was in fact received in the Court and who deposited the same.

9. However, we propose to examine the evidence available on record assuming that the prosecution has established that the cause of death of deceased was poison.

10. The Hon'ble Apex Court in the matter of **Sharad Birdhichand Sarda Vs. State of Maharashtra** reported in **(1984) 4 SCC 116** has held that in the cases

of murder by poisoning the Court must carefully scan the evidence and determine the four important circumstances which alone can justify a conviction :

(1) there is a clear motive for the accused to administer poison to the deceased;
(2) that the deceased died of poison said to have been administered;
(3) that the accused had the poison in his possession;
(4) that he had an opportunity to administer the poison to the deceased.

The above view has been substantially accepted in the later cases of the Supreme Court also. However, the third piece of evidence to establish the case of murder by poisoning has been subsequently doubted in the matter of **Bhupendra Singh Vs. State of Punjab** reported in **(1998) 3 SCC 513.**

11. In the instant case, to establish that the appellant administered poison to the deceased, the prosecution has relied upon the statements of PW-22 Mohanlal Singhaniya who has stated that on 27.12.1997 he sold the appellant 100 ml democron pesticide for Rs.51/- vide cash memo of Ex.P/16. On the basis of statements of PW-12 Ganjhuram, PW-13 Bharatlal and PW-14 Devsai Sidar, evidence has been led to this effect that accused Sahadeo gave Rs.20/- to Bharatlal/Ganjhuram for bringing liquor whereupon they went to *Bejoghar* , brought liquor and gave it to Sahadeo and thereafter Sahadeo entered his house with liquor. It is further stated by them that while they were cleansing their teeth with *Gudaku* (tobacco mixed toothpaste) near the house of Sahadeo, they saw Sahadeo coming out of his house holding glass and bottle and he went towards the shop of Sabeblal. When they went to the shop of Saheblal they saw that accused Sahadeo was giving liquor to Saheblal and in the morning they learnt that Saheblal has died. PW-13 and PW-14 have been cross examined by the prosecution after declaring them hostile. However, from the cross examination of witness Ganjhuram (PW-12) it appears that this witness has made improvement over his diary statement and has stated that he saw the accused giving liquor to deceased Saheblal. Apart from the statements of the above three witnesses PW-1 Pandey Prasad – the complainant has stated that after learning about the sickness of Saheblal, he went to his house and saw that Saheblal was shivering. When he asked Saheblal as to what has happened, he said that Sahadeo has

administered something to him. Similar is the statement of child witness Laxmi (PW-4) – daughter of the deceased, who has also stated that her father told that "Sahadeo has administered to him something, call him". Thereafter, she went to the house of Sahadeo and found that he had closed his door and his wife said that he was not in the house. PW-5 Shankar who is father of the deceased has stated that 5-6 years back there was a dispute between Saheblal and accused Sahadeo as accused had caught the wife of deceased, on which he and Saheblal had beaten Sahadeo. He has also stated that Pandey Prasad told him that Saheblal was sitting with Sahadeo who gave him poison. Bhumisuta – wife of the deceased has stated that appellant called Saheblal and he had gone with him, thereafter Saheblal returned and he was not feeling well. Saheblal was writhing in pain and when she asked Saheblal told that Sahadeo has administered something to him, therefore, he was not feeling well and he shall not survive. Sahadeo came to her house at the same time. She has also stated in her evidence that 4-5 years prior to the date of incident the accused had caught hold of her, on which her husband had beaten him. PW-9 Surjo Bai – daughter of the deceased has also stated that her father was abusing Sahadeo alleging that he has administered something to him. Similar is the statement of PW-15 Khageshwar – son of the deceased. In the cross examination also the above witnesses have stuck to their statements of examination in chief.

12. The prosecution in order to establish involvement of the appellant has recorded the memorandum Ex.P/6 which is proved by PW-2 Baigaram. On the basis of this memorandum ash from the container of burnt plastic bottle has been purportedly seized which is marked as article 'C'. This article was sent to the F.S.L., Sagar, however, it did not contain poison as per report of the F.S.L. PW-3 Pitambar has proved the seizure memo Ex.P/8 by which the bottle containing remaining liquor was seized from Udayram Rawat. Mohanlal Singaniya (PW-22) has proved the cash memo of Ex.P/16 by which the appellant purchased democron insecticide from his shop.

13. The first circumstance relied upon by the trial Court to connect the accused with the commission of the offence is that the accused purchased poison democron on 27.12.1997 vide Ex.P/16. However, the container of the democron has not been seized as according to the prosecution the same was burnt by the mother of the accused. Ash of the burnt container was sent to

F.S.L. as article 'C' and as per report of the F.S.L. the same did not contain poison. Purchasing of the democron by the appellant who is admittedly a farmer, cannot be considered as an incrimination circumstance against him. Moreover, there is no evidence on record to show that the poison detected by the F.S.L. in the viscera of the deceased was the same poison which is also present in the democron insecticide.

14. So far as the second circumstance – that the accused had an opportunity to administer the poison to the deceased – relied upon by the trial Court is concerned, from the evidence available on record we find that the appellant had the opportunity to administer poison to the deceased as he provided poisonous liquor to the deceased immediately before the incident. However, from the analysis of the statements of PW-12 Ganjhuram, PW-13 Bharatlal and PW-14 Devsai Sidar as also from the statement of PW-19 Tejmati, it emerges that the appellant got liquor through Ganjhuram, Bharatlal and Devsai Sidar who brought the liquor from the shop of Tejmati and handed over the same to the accused and the accused went inside his house, carried a glass and bottle of liquor and handed over the same to the deceased for consumption. That after consuming the said liquor the deceased fell sick and started writhing in pain. The deceased suspected that the appellant has mixed something in liquor. The deceased died soon after consuming the said liquor. Thus, from the above evidence it cannot be inferred for certainty that the appellant mixed poison in the liquor bottle before handing over the same to the deceased as the witnesses Ganjhuram, Bharatlal, Devsai Sidar as also witness Tejmati had an opportunity to mix poisonous substance in the liquor handed over by them to the appellant who in turn gave the same to deceased.

15. Vomit of the appellant was allegedly seized at the instance of the appellant vide Ex.P/9 which has been proved by PW-3 Pitambar and PW-24 Y.P.Patel, A.S.I. and the same was marked as article 'H' and sent to F.S.L. for examination. The report of the F.S.L. reveals that the above article also contains the same poisonous substance as found in the viscera of the deceased. Therefore, from the above evidence it is clear that the appellant had also consumed the same liquor from the same bottle which was provided to the deceased. Thus, we are of the considered opinion that possibility that the appellant did not know that the liquor in the bottle provided to the deceased

contained poison, cannot be ruled out. However, this aspect has been totally ignored by the learned trial Court.

16. In order to justify the conviction in the case of murder by poisoning, the prosecution is required to establish clear motive for the accused to administer poison to the deceased. However, in the instant case to attribute motive to the accused, the prosecution has tried to lead evidence to the effect that 5-6 years prior to the date of incident there was some quarrel between the appellant and the deceased as the appellant had caught hold of wife of the deceased whereupon he was beaten by the deceased and his father Shankar. PW-6 Bhumisuta – wife of the deceased has also stated that 4-5 years back, the appellant had caught hold of her, she narrated the incident to her husband and her husband had beaten the accused. The incident which occurred 4-5 years prior to the date of incident cannot be remotely considered to be the motive of the appellant to cause death of deceased Saheblal. From the evidence available on record, we find that the appellant arranged liquor for the deceased and handed over same to him and as such it can be inferred that relation between the appellant and the deceased were cordial. Though there is evidence that Saheblal died on account of poison administered to him, however, we have already held in the foregoing paragraphs on the basis of evidence available on record that the possibility that the appellant was not having the knowledge that the liquor offered by him to the deceased was in fact poisonous, cannot be ruled out as he himself consumed the same liquor in a small quantity and vomitted, therefore, the second and fourth important circumstance even after considering to be established, cannot be made basis for holding the accused/ appellant guilty of causing homicidal death of deceased Saheblal intentionally by providing him poisonous liquor.

17. The Supreme Court in the matter of **Jaipal Vs. State of Haryana** reported in **(2003) 1 SCC 169** has held that the Court has to circumspect while dealing with the cases of circumstantial evidence. Paragraph – 33 of the above judgment is being reproduced hereinunder;

"33. Dealing with a case of circumstantial evidence the court has to be circumspect. A note of caution was sounded by a Constitution

Bench of this Court in *Raghav Prapanna Tripathi v. State of U.P.*[5] quoting (at AIR p. 89, para 60) from *R. v. Hodge*[6]:

> "The mind was apt to take a pleasure in adapting circumstances to one another, and even in straining them a little, if need be, to force them to form parts of one connected whole; and the more ingenious the mind of the individual the more likely was it, considering such matter, to overreach and mislead itself, to supply some little link that is wanting, to take for granted some fact consistent with its previous theories and necessary to render them complete."

5. AIR 1963 SC 74 : (1963) 1 Cri LJ 70
6. (1838) 2 Lew CC 227

18. On the basis of aforesaid analysis, we are of the considered opinion that the prosecution has utterly failed in proving such chain of circumstantial evidence as would fasten the guilt on the accused leaving no room for doubt. Accordingly, the appeal is allowed. The conviction of the accused under Section 302 of the IPC and the sentence passed thereon by the trial Court are set aside. The accused/appellant is acquitted. He shall be released forthwith if not required to be detained in any other offence.

Sd/-
V.K.Shrivastava
Judge

Sd/-
Dhirendra Mishra
Judge